92-258

Supreme Ct., U.S.
JUL 2 1992
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. ____

JAMES G.J. CHENEVERT,
Petitioner,

v.

LOU A. HESSE and DUANE WOODARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

A. DID THE TRIAL COURT'S SUA SPONTE EXCLUSION OF THE APPELLANT'S PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE VIOLATE HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

B. DID THE TRIAL COURT'S EXCLUSION OF THE APPELLANT'S PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE VIOLATE HIS CONSTIUTIONAL RIGHT TO REMAIN SILENT?

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THE PETITIONER, JAMES G.J. CHENEVERT, by and through his attorney, Clifford J. Barnard, hereby petitions this Court to issue a Writ of Certiorari to review

the opinion of the United States Court of Appeals for the Tenth Circuit entered on April 10, 1992.

II. OPINIONS BELOW

(a) On October 8, 1988, the Colorado Court of Appeals issued its unreported opinion which is attached hereto and designated as APPENDIX A.

(b) On March 27, 1989, the Colorado Supreme Court denied the defendant's Petition for Writ of Certiorari which is attached hereto and designated as APPENDIX B.

(c) On May 9, 1991, the Federal Judge Magistrate for the District of Colorado issued his recommendation which is attached hereto and designated as APPENDIX C.

(d) On May 31, 1991, the Federal District Court for the District of Colorado issued its opinion which is attached hereto and designated as APPENDIX D.

(e) On April 10, 1992, the Tenth Circuit of Court

of Appeals issued its opinion which is attached hereto and designated as APPENDIX E.

III. JURISDICTION

(a) The date of judgment which is sought to be reviewed was April 10, 1992.

(b) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the United States Fifth Amendment (right to due process of law), Sixth Amendment (right to counsel) and Fourteenth Amendment (applying the Fifth and Sixth Amendments to the states).

The statutory provisions involved are Colorado Revised Statutes Section 16-8-102 through Section 16-8-

107 (Colorado statutes regarding Impaired Mental Condition - see APPENDIX F).

V. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is a habeas corpus case brought pursuant to 28 U.S.C. Section 2254 involving a first degree murder conviction in a Colorado District Court. The case was appealed to the Colorado Court of Appeals and the District Court's ruling was affirmed on October 6, 1988. The Colorado Supreme Court denied a Petition for Writ of Certiorari on March 27, 1989.

The petitioner then brought a habeas corpus action in the United States District Court for the District of Colorado. The habeas corpus claim was dismissed by the U.S. District Court on May 31, 1991 and that ruling was affirmed by the Tenth Circuit Court of Appeals on April 10, 1992.

The petitioner's habeas corpus claim is that he is being wrongfully held because his constitutional rights were violated when the Colorado District Court judge excluded testimony by a psychiatrist regarding the petitioner's mental state at the time of the alleged murder. The trial court's exclusion of the psychiatric testimony was based on the court's finding that the petitioner had failed to fulfill the requisite Colorado statutory procedural requirements for claiming an "implied mental condition" and that, therefore, any psychiatric testimony on his behalf was inadmissible.

The petitioner claims that he did not have to comply with the Colorado statutory requirements for pleading "impaired mental condition" because he was not claiming that he was suffering from any of the conditions which the statute defined as "impaired mental conditions"; rather, he was denied the right to present psychiatric evidence about other mental problems which were not

included in the statutory definition of "impaired mental condition", but which interfered with his ability to formulate the necessary mental state for him to be convicted of first degree murder. In all previous decisions in this case, the courts have dealt with and based their decisions on the first part of C.R.S. Section 16-8-103.5(1) which states that, "If the defendant intends to assert the affirmative defense of impaired mental condition, he shall indicate that intention to the court and to the prosecution at the time of arraignment ..." The courts have then gone on to say that the defendant in this case tried to circumvent the statute and the provisions regarding procedure and discovery. As can be readily seen in the record in this case, this is not a situation in which the defendant was hiding his defense and/or was trying to surprise the prosecution with the presentation of unexpected psychiatric testimony. Rather, from the beginning, the defendant made his position very clear to

the court and to the prosecution.

The lower courts have then specifically based their opinions on the first sentence of C.R.S. Section 16-8-102(2.7) where "impaired mental condition" is defined. The important distinction which all of the lower courts reviewing this case have not understood or addressed is that the crux of the defendant's argument is based on the second sentence of the C.R.S. Section 16-8-102(2.7) which specifically states that impaired mental condition, "includes only those severely abnormal mental conditions which grossly and demonstrably impair a person's perception or understanding of reality..." (Emphasis added). It is also very important to note that this sentence was added to the statute in order to specifically limit the use of the impaired mental condition defense. Because limitations were placed on the types of disorders to which the statute applied, adherence to the strict construction of the limitations delineated in the statute is required.

It is the defendant's contention that he was suffering from several disorders which were NOT INCLUDED in the statute but which disorders did interfere with and preclude him from formulating the necessary mens rea of specific intent.

The defendant is not claiming at this time that there is a constitutional problem with the Colorado Impaired Mental Condition statute as long as other relevant psychiatric testimony is permitted. However, the defendant is claiming that if relevant psychiatric testimony which relates directly to a defendant's mens rea, or ability to formulate specific intent, is impermissible and inadmissible in a court because it is not included in the Colorado Impaired Mental Condition statute, then that statute must fall as being constitutionally infirm.

In particular, in the case at bar, the defendant was suffering from the mental disorders of paranoid personality disorder (chronic "conjugal paranoia" or delusional

jealousy) and major depression, neither of which fall under the limitations of the second sentence of the Colorado Impaired Mental Condition statute. (See APPENDIX I for Dr. Plazak's full report). However, these are mental disorders which are well documented, well defined and universally recognized as disorders which can interfere with a person's ability to formulate specific intent. Therefore, it is the defendant's position that if these disorders are not included in the Colorado Impaired Mental Condition statute, a psychiatrist should be permitted to testify about these disorders without following the requisite procedures of the Impaired Mental Condition statute. If a defendant is not permitted to present this testimony (as occurred in this case), the defendant's constitutional rights to due process and effective assistance of counsel are violated and the statute is unconstitutional.

In this case, the prosecution wants to have the best of both worlds. On the one hand, the prosecution would

surely have been able to exclude Dr. Plazak's testimony because the doctor's diagnosis of the petitioner's mental disorders could not be characterized as "grossly and demonstrably impair(ing) a person's perception or understanding of reality", as required by the Colorado Impaired Mental Condition statute. Therefore, this testimony would not have been admissible. On the other hand, the prosecution also wants to be able to exclude Dr. Plazak's testimony on the ground that the defendant did not plead the affirmative defense of impaired mental condition testimony. By the way the statute reads and by the way the courts have ruled in this case, the defendant has been in a no-win situation: the psychiatric testimony would have been inadmissable pursuant to the statute even though the defendant was suffering from a mental disorder which affected his ability to formulate specific intent and inadmissible if he did not follow the statutory requirements. However, the evidence is clearly relevant,

clearly material and goes to the heart of one of the most essential elements of the alleged charge of first degree murder.

B. STATEMENT OF THE FACTS.

The petitioner was charged with first degree murder of his wife in Adams County, Colorado on November 12, 1985. On February 20, 1986, the State filed a MOTION IN LIMINE TO STRIKE PSYCHIATRIC EVIDENCE in which it requested the court to order that the testimony of psychiatrist Dr. Dean Plazak be stricken because the petitioner had not followed the procedures set forth in the Colorado statutes pertaining to the affirmative defense of impaired mental condition. The state requested that evidence of impaired mental condition be disallowed until the petitioner complied with the statutory procedures, or, in the alternative, that the jury be instructed on the impaired mental condition affirmative defense.

At a later hearing on motions, defense counsel informed the court and state that the defense was not going to elicit testimony that the petitioner was insane or was suffering from a statutorily included impaired mental condition. Rather, the defense stated that it intended to present testimony that the petitioner was suffering from a condition not included in the impaired mental condition statute, but which condition still caused the petitioner to be unable to act with the requisite intent.

At a subsequent hearing on motions, the court granted the state's request for a psychiatric evaluation of the petitioner pursuant to the Colorado impaired mental condition statute. Counsel for the petitioner informed the court that the petitioner would invoke his constitutional right to remain silent at any such interview and did so exercise his right when the court-appointed psychiatrist attempted to interview him.

At a motions hearing after the interview, the state

requested that the court-appointed psychiatrist be permitted to testify that the petitioner had exercised his Fifth Amendment right to remain silent and that the trial court hold in abeyance any ruling on the state's MOTION TO STRIKE PSYCHIATRIC EVIDENCE because the state believed that it was prepared to rebut any psychiatric evidence presented by the defense. The trial court ruled, contrary to the state's wishes, that any psychiatric evidence by Dr. Plazak would be stricken.

Dr. Plazak would have testified that the petitioner was suffering from "paranoid disorder (chronic 'conjugal paranoia' or delusional jealousy) and major depression, recurrent with mood-congruent psychotic features..." and that neither of these disorders constituted an "impaired mental condition" as defined in the Colorado Revised Statutes Section 16-8-102 (2.7). Furthermore, Dr. Plazak would have testified that these conditions in the petitioner constrained him from formulating the necessary specific

intent for the crime of first degree murder.

On May 5, 1986, trial began and on May 9, 1986, the jury returned a verdict of guilty of first degree murder. Pursuant to the court's order, Dr. Plazak did not testify at the trial.

VI. ARGUMENTS

FIRST ARGUMENT: THE TRIAL COURT'S SUA SPONTE EXCLUSION OF THE PETITIONER'S PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

In this case, the "impaired mental condition" statute, C.R.S. Section 16-8-103.5, is inapplicable because it includes certain mental conditions which would relate directly to a defendant's mens rea, but fails to include all of the mental conditions affecting culpability which would also relate directly to a defendant's mens rea. The petitioner here claims that because his mental state was one which was not included in the state legislature's

statute, that defense would not be appropriate for him, nor should the statute and its requirements apply to him. Even if the legislature may have intended to include such illnesses as that from which this petitioner was suffering, it failed to include them, and, therefore, the "impaired mental condition" law should not and cannot apply to the petitioner. Courts cannot simply ignore the statutory language and apply a statute when the language does not apply to the facts of the case.

C.R.S. Section 16-8-102(2.7) defines "impaired mental condition" as:

> ... a condition of mind, caused by mental disease or defect, which does not constitute insanity but, nevertheless, prevents the person from forming a culpable mental state which is an essential element of a crime charged. For the purposes of this subsection (2.7), "mental disease or defect" **includes only those severely abnormal mental conditions which grossly and demonstrably impair a person's perception or understanding of reality** and which are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality manifested

> only by repeated criminal or otherwise antisocial conduct. (Emphasis added).

In his report which was presented to both the trial and appeals courts, Dr. Plazak gave his opinion that, at the time of the events which were the basis for the charges, the petitioner,

> ... was suffering from two mental diseases classified as psychotic disorders, specifically those of paranoid disorder (chronic "conjugal paranoia" or delusional jealousy) and major depression, recurrent with mood-congruent psychotic features. ... This examiner is further of the opinion that these disorders or mental impairments precluded the capacity of Mr. Chenevert to form the specific intent required for the commission of these crimes presently charged.

The mental diseases described by Dr. Plazak in his report are not mental diseases which fall under the statutory definition of "impaired mental condition." In particular, they are not, "severely abnormal mental conditions which grossly and demonstrably impair a person's perception or understanding of reality." C.R.S. Section 16-8-102(2.7). Because "paranoid disorder" and

"major depression" do not fall under the statutory definition of "impaired mental condition," but because they can preclude a person from forming the necessary specific intent, such evidence still should be allowed because it would be relevant and material. If these disorders do not fall under the statutory definition of "impaired mental condition," the requirements of the Colorado "impaired mental condition" statute do not apply.

In Hendershott v. People, 653 P.2d 385 (Colo. 1983), the Colorado Supreme Court stated that C.R.S. Section 18-1-803 (the old statute on impaired mental condition which was limited in its reference to "specific intent" crimes), "represents a statutory affirmative defense for specific intent crimes rather than, as construed by the courts below, a statutory prohibition of mental impairment evidence in all but specific intent offenses." Hendershott, supra, at 392, ftn. 5. Thus, a defendant could still present evidence of impaired mental condition in general intent

cases, but it was not an affirmative defense and did not trigger burden of proof consequences which accompanied affirmative defenses.

In the case at bar, the petitioner wished to present psychiatric and psychological evidence which was relevant and material to the mens rea element of the charge, but which, by the statutory definition of "impaired mental condition", did not amount to or was not included in the "impaired mental condition" statute. Thus, the petitioner was attempting to present evidence which was relevant to the petitioner's ability to formulate the necessary intent, but which evidence was not covered by the "impaired mental condition" statutory definition.

Just as "impaired mental condition" evidence was admissible in the Hendershott case to attack the mens rea element, but did not have affirmative defense consequences or requirements, the non-qualifying impaired mental condition evidence in this case should have been

admissible to attack the mens rea element without triggering the affirmative defense consequences or requirements.

The diagnostic criteria for "Paranoid Disorder" as listed in DSM-III (DSM-III is the appropriate source as opposed to DSM-III-R because DSM-III-R had not yet been published when this matter went to hearing) are:

> A. Persistent persecutory delusions or delusional jealousy.
>
> B. Emotion and behavior appropriate to the content of the delusional system.
>
> C. Duration of illness of at least one week.
>
> D. None of the symptoms of criterion A of Schizophrenia (p.188) such as bizarre delusions, incoherence or marked loosening of associations.
>
> E. No prominent hallucinations.
>
> F. The full depressive or manic syndrome (criteria A and B of major depressive or manic episode, p.213, and p.208) is either not present, developed after any psychotic symptoms, or was brief in duration relative to the duration of the psychotic symptoms.
>
> G. Not due to an Organic Mental Disorder.

DSM III, p. 196.

From this definition of "paranoid disorder," and in particular with regard to chronic "conjugal paranoia", it is clear that "paranoid disorder" does not fall within the definition of "mental disease or defect" as defined by the impaired mental condition statute. In particular, paragraph D above specifically states that "paranoid disorder" DOES NOT INCLUDE the symptoms of schizophrenia "such as bizarre delusions, incoherence or marked loosening of associations." These are the specific characteristics to which the impaired mental condition was referring when it used the words, "severely abnormal mental conditions which grossly and demonstrably impair a person's perception or understanding of reality." C.R.S. Section 16-8-102 (2.7).

The impairment of perceptions referred to in the impaired mental condition statute goes to a distortion of

all reality; the impairment of perceptions in a paranoid disorder goes only to a very narrow or minor topic. As paragraphs D and E in the list of criteria for paranoid disorder point out, there are no bizarre delusions, incoherence or hallucinations in a paranoid disorder. Thus, there is no gross impairment of a person's perception or understanding of reality; such a person can easily understand and perceive all of reality EXCEPT THE MINOR TOPIC WHICH IS THE SUBJECT OF HIS OR HER PARANOIA. When paragraph D in the list of criteria for "paranoid disorder" specifically excluded schizophrenia, this by definition eliminated "paranoid disorder" from "impaired mental condition" as defined by C.R.S. Section 16-8-102 (2.7).

With regard to "conjugal paranoia", the delusional aspect is even narrower because the only subject for

delusion is one person: the spouse. Thus there is clearly a lacking of gross impairment of reality in such a case; a person suffering from "conjugal paranoia" can perceive all of reality except as it relates to his or her spouse.

With regard to "Major Depression", the diagnostic criteria as listed in DSM III are:

> A. One or more major depressive episodes (p.213).
> B. Has never had a manic episode (p.280) or hypomanic episode (see p.209).
>
> DSM III, p. 218.

The diagnostic criteria for "Major Depressive Episodes" as listed in DSM III are:

> A. Dysphoric mood or loss of interest or pleasure in all or almost all usual activities and pastimes. The dysphoric mood is characterized by symptoms such as the following: depressed, sad, blue, hopeless, low down in the dumps, irritable. The mood disturbance must be prominent and relatively persistent, but not necessarily the most dominant symptom, and does not include momentary shifts from one dysphoric mood to another dysphoric mood, e.g., anxiety to depression to anger, such as are seen in states of

> acute psychotic turmoil. (For children under six, dysphoric mood may have to be inferred from a persistently sad facial expression.)
>
> DSM III, p. 213.

Again, as with the "paranoid disorder", the criteria for "major depression" do not include the requisite "severely abnormal mental conditions which grossly and demonstrably impair a person's perception or understanding of reality." C.R.S. Section 16-8-102 (2.7). Thus, evidence showing that the petitioner was suffering from "major depression" should not have fallen under the Colorado "impaired mental condition" statute.

With regard to any finding that the trial court's exclusion of the expert psychiatric testimony did not sua sponte exclude the expert psychiatric testimony because the prosecution had filed a motion to exclude the evidence, the trial court did in fact sua sponte order it because the prosecution had temporarily withdrawn the motion. Mr. Robert Grant, the prosecutor in this case,

stated prior to the court's ruling that:

> ... I would ask the Court to hold in abeyance any ruling on the Motion to Strike the Psychiatric Evidence that is about to be proffered by the Defense in this case, and I ask that because as I say, I think as a basic practical matter, I am prepared.
>
> Tr.V. 8, p.5, ls.13-17.

Even though the motion had been withdrawn, the trial court then sua sponte ordered the exclusion of the testimony. The exact reason why the trial court made this ruling considering the circumstances is somewhat unclear. The Colorado Court of Appeals and the United States District Court held that the exclusion of this evidence was correct because the petitioner had not followed the procedures required by the Colorado impaired mental condition statute, C.R.S. Section 16-8-103.5. The U.S. District Court also stated that the exclusion of this evidence in a sua sponte manner was appropriate because a trial judge may on his or her on initiative exclude

inadmissible evidence. In a case like this where the prosecution has withdrawn its motion, it was an abuse of the trial court's discretion to rule on the matter sua sponte. Such action by the trial court amounted to judicial misconduct and was a usurpation of the prosecutor's discretion in determining the state's trial strategy.

Moments after the trial court was informed that the petitioner had exercised his Fifth Amendment right and had refused to answer any questions posed him by the court-appointed psychiatrist, the trial court ruled on the inadmissibility of the psychiatric and psychological evidence as follows (note: reference to "Mr. Grant" is to Robert Grant, trial prosecutor):

> Okay, well, I'm prepared to rule on Mr. Grant's Motion to Strike Psychiatric Testimony by the Defense, and based upon what I have heard, and contrary to Mr. Grant's wishes in this matter, that is the ruling, I'm going to make that the defense is not going to be permitted to introduce psychiatric testimony at the trial, bearing upon Mr. Chenevert's ability to form, or whether he did or whether he could or whether he did form the

> requisite intent to commit the crime with which he is charged.
>
> It just appears to the Court that what the Defense is trying to do, regardless of how the defense cares to characterize it, to get around the statutes that relate to impaired mental condition.

Tr.V. 8, p. 11, ls. 2-14.

Several courts have stated or suggested that the petitioner's arguments are merely a ploy to circumvent the statutory requirements regarding the "impaired mental condition" statute. This conclusion is a great misinterpretation of the petitioner's motives in choosing his defense. The petitioner never attempted to circumvent the "impaired mental condition" statute by requesting the admission of Dr. Plazak's testimony; rather, out of a recognition of the inapplicability of the statute given the specific context of the petitioner's case, the petitioner was attempting to exercise his right to present evidence about his mental state without pleading "impaired mental condition." It should be noted that the petitioner

specifically stated in the early stages of the trial court proceedings that the affirmative defense of "impaired mental condition" was not being claimed, but that he, nevertheless, wished to present psychiatric evidence related to his mental state. The trial court, however, rejected the petitioner's argument and, in particular, stated as follows:

> I understand that defense is saying that's not the defense in this thing, but the Court can't make that subtle a distinction. Perhaps some appellate court can, but this trial court can't.

Tr.V.8, p. 11, ls. 15-18.

The statutory definition of "impaired mental condition" and the definitions of the mental conditions from which the petitioner was suffering are in conflict and therefore should be differentiated. The petitioner is now asking the federal courts to recognize this distinction and to enforce the Colorado statutes as they were written and to apply them according to the letter of the law. The

courts' failure to follow the letter of the law in the petitioner's case has denied him due process of the law and therefore, his Petition for Writ of Habeas Corpus should be granted.

SECOND ARGUMENT: THE TRIAL COURT'S SUA SPONTE EXCLUSION OF THE PETITIONER'S PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE VIOLATED HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

The standard of review by the court of this issue should be one of legal and mixed legal-factual questions. This issue was raised and ruled on by the trial court at Trial Volume 8, page 11.

As stated earlier, shortly after the petitioner had refused to answer any questions posed by the psychiatrist appointed to interview him for the prosecution, the trial court sua sponte excluded the testimony of Dr. Dean Plazak. It appears that, part of the reason why this testimony was excluded was because the petitioner had exercised his right to remain silent. Even if the Colorado

"impaired mental condition" statute applied, the petitioner had the right to remain silent and the trial court had no justification for excluding Dr. Plazak's testimony based on the petitioner's exercise of his Fifth Amendment constitutional right.

United States and Colorado state laws uphold this right:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense.' Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297, 312 (1973); see Washington v. Texas. 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (state statutory scheme which prevented an accused from securing co-participant's testimony at trial denied the accused his constitutional right to compulsory process for obtaining witnesses in his favor.)
>
> As this court observed in People v. Cornelison, 192 Colo. 337, 559 P.2d 1102 (1977), much more than being a mere anomaly, it would be a violation of due process to require the prosecution to establish the culpable mental state beyond a reasonable doubt while, at the same time, to prohibit a defendant from presenting evidence to contest this issue. Such a prohibition assumes all the features of an impermissible

presumption of culpability.

> A rule precluding the defendant from contesting the culpability element of the charge would render the prosecution's evidence on that issue uncontestable as a matter of law, in derogation of the presumption of innocence and the constitutional requirement of prosecutorial proof of guilt beyond a reasonable doubt. E.g., Sandstrom v. Montana, 442 U.S. at 520-524, 99 S.Ct. at 2457-59, 61 L.Ed.2d at 48-51; Morissette v. United States, 342 U.S. at 274-75, 72 S.Ct. at 255-56, 96 L.Ed.2d at 306-307.
>
> Hendershott v. People, 653 P. 2d 385, 391 (Colo. 1983).

Because the trial court denied the petitioner the right to call Dr. Plazak as a witness in this matter at least partially based on his exercise of his Fifth Amendment constitutional right to remain silent, this amounted to a violation of the petitioner's Fourth, Fifth and Fourteenth Amendment rights as guaranteed by the United States Constitution. For these reasons, the petitioner's Petition for Writ of Habeas Corpus should have been granted.

VII. REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Colorado State Courts and the 10th Circuit Federal Courts have failed to clarify the ambiguity regarding whether or not the Colorado Impaired Mental Condition Statute is intended to be inclusive of all mental disorders affecting mens rea. Consequently, this lack of clarity and specificity created a judicial environment that deprived the petitioner of his constitutional right to due process of law and his Sixth Amendment right to effective assistance of counsel as argued above.

CONCLUSION

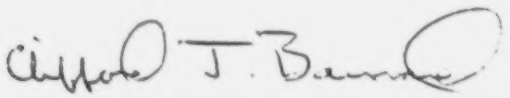
For the above-stated reasons and distinctions, the petitioner believes that the trial court should have permitted Dr. Dean Plazak to testify because the diseases to which he would have referred were not included or covered by the Colorado "impaired mental condition"

statute and because it was crucial in the determination of the petitioner's mens rea. As the Colorado Supreme Court concluded in Hendershott, supra, at 394, "We therefore disapprove the trial court's ruling as violative of due process of law and hold that reliable and relevant mental impairment evidence is admissible, upon proper foundation, to negate the culpability element of the criminal charge." Just as this was true in Hendershott, so should it be true that reliable and relevant mental impairment evidence not included in the statutory definition of "impaired mental condition" should have been admissible in the petitioner's case, upon proper foundation, to negate the culpability element of the criminal charge of first degree murder. The exclusion of this relevant and material evidence denied the petitioner due process of law and affective assistance of counsel and for these reasons, the petitioner's conviction should be vacated.

Because the exclusion of Dr. Plazak as a witness in this matter at least partially based on his exercise of his Fifth Amendment constitutional right to remain silent, the petitioner's Petition for Writ of Habeas Corpus should have been granted.

DATED this 8th day of July, 1992.

Respectfully submitted,



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

APPENDIX A

COLORADO COURT OF APPEALS

No. 86CA0806

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JAMES G. CHENEVERT, Defendant-Appellant.	)	NOT SELECTED FOR PUBLICATION

Appeal from the District Court of Adams County
No. 85CR1106-F

Honorable Philip F. Roan, Judge

DIVISION I — JUDGEMENT AFFIRMED
Opinion by JUDGE PIERCE
Sternberg and Reed, JJ., concur

Duane Woodward, Attorney General
Charles B. Howe, Chief Deputy Attorney General
Richard H. Forman, Solicitor General
Hope P. McGowan, Assistant Attorney General
Denver, Colorado

Attorneys for Plaintiff-Appellee

APPENDIX A

David F. Vela, Colorado State Public Defender
Michael J. Heher, Deputy State Public Defender
Denver, Colorado

Attorneys for Defendant-Appellant

Defendant, James Gillis Chenevert, appeals the judgment of conviction entered on a jury verdict finding him guilty of first degree murder. We affirm.

I.

The principal issue on appeal is whether the trial court erred in ruling psychiatric evidence inadmissible because defendant failed to assert the affirmative defense of impaired mental condition pursuant to Section 16-8-103.5, C.R.S. (1986 Repl. Vol. 8A). Defendant contends that he had an unconditional constitutional right to present testimony by a psychiatrist, retained by him, to rebut the prosecution's assertion that he acted with requisite intent. We disagree.

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Although it is a fundamental right of a defendant to present witnesses in his defense, pre-conditions to the exercise of that right, when reasonable in nature, do not constitute an abridgement of that right. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); People v. Hampton, 696 P.2d 765 (Colo. 1985). The General Assembly has the power to define criminal conduct and to establish the legal components of criminal liability, as well as to formulate principles of criminal responsibility and justification, within constitutional limitations. Colo. Const. art. V, Section 1; see Hendershott v. People, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103 S.Ct. 1232, 75 L.Ed.2d 466 (1983). Therefore, "[t]he General Assembly can require certain matters to be raised by a special plea without offending the constitutional rights of the accused." People v. Low, 732 P.2d 622 (Colo. 1987).

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The affirmative defense of impaired mental condition must be raised by a special plea. Section 16-8-103.5, C.R.S. (1986 Repl. Vol. 8A). The purpose of this statute is to prevent a defendant from asserting the defense in such a manner as to circumvent the requirements of disclosure under Crim. P. 16 Failure to plead the defense under the statute renders evidence of impaired mental condition inadmissible. People v. Low, supra.

Defendant contends that the purpose of the testimony of his psychiatrist was not to present evidence of impaired mental condition but rather to rebut the prosecution's assertion that he acted with the culpable mental state. No offer of proof was given as to the distinction. However, the psychiatrist had concluded that defendant suffered from two psychotic disorders that "precluded the capacity of [defendant] to form the specific intent required for the commission of those crimes presently

charged." The trial court found this evidence to be, in reality, evidence of impaired mental condition. We agree.

An impaired mental condition is defined as:

> "a condition of mind, caused by mental disease or defect, which does not constitute insanity, but nevertheless, prevents the person from forming a culpable mental state which is an essential element of the crime charged." Section 16-8-102(27), C.R.S. (1986 Repl. Vol. 8B)

The opinion of the psychiatrist establishes that defendant suffered from impaired mental condition. Such evidence is not admissible unless the defendant is pleaded as required by the statute. We have no idea why he did not assert the defense, but having not chosen to assert the affirmative defense of impaired mental condition, waived his right to present evidence which would have helped establish that defense. The trial court's ruling was therefore without error.

II.

We also reject defendant's contention that his Fifth

Amendment rights were violated. The record does not indicate that the refusal to cooperate during the court-ordered psychiatrist's examination was a basis for the trial court's decision to exclude psychiatric evidence by the defense. Rather, the record shows that the decision was properly based on the court's finding that use of that evidence was in effect, an assertion of the defense of impaired mental condition outside the statute.

III.

Defendant next contends that a certain out-of-court statement made by the victim was inadmissable hearsay. We disagree.

The statement was offered to show defendant's state of mind when he responded that he thought "she wants to die." Out-of-court statements which are not offered to prove the truth of the words spoken, but rather to establish the state of mind of the defendant are not hearsay. People v.

APPENDIX A

Madson, 638 P. 2d 18 (Colo. 1981).

Defendant's remaining allegation of error is without merit.

Judge affirmed.

JUDGE STERNBERG and JUDGE REED concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
Case No. 89SC8
Certiorari to the Colorado Court of Appeals 86CA806
Adams County District Court 85CR1106

ORDER OF COURT

JAMES G. CHENEVERT,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeal,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 27, 1989.

APPENDIX B

cc: Gary Sonke, Clerk
Colorado Court of Appeals

David F. Vela
Colorado State Public Defender
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Duane Woodard, Attorney General
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Honorable Philip F. Roan
Adams County District Court
Hall of Justice
1931 East Bridge Street
Brighton, CO 80601

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-268

JAMES G.J. CHENEVERT,

Petitioner,

v.

LOU A. HESS, Superintendent of the Colorado Fremont Correctional Facility, and DUANE WOODARD, Attorney General, State of Colorado,

Respondents.

RECOMMENDATION BY UNITED STATES MAGISTRATE

Petitioner, an inmate at the Fremont Correctional Facility, initiated this action through counsel, by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. Pursuant to Rule 605 of the Local Rules of Practice for the District of Colorado, the matter was referred to Magistrate Judge Hilbert Schauer. An order to show

cause was issued and the respondents filed an answer. The petitioner also filed a motion for evidentiary hearing to which a response was filed. Subsequently, the trial court record was ordered and received. Having carefully reviewed the pleadings, the appellate briefs and the record, including the psychiatric report of Dr. Plazak, the Magistrate Judge recommends that the petition be dismissed.

On May 9, 1986, the petitioner was convicted of First Degree Murder during a jury trial in Adams County District Court. He was sentenced to life imprisonment. His conviction was affirmed by the Colorado Court of Appeals, and his petition for writ of certiorari was denied, en banc, by the state Supreme Court. The issues raised on appeal include the two grounds raised in this petition, therefore, petitioner has exhausted all available remedies.

Petitioner asserts that the trial court's sua sponte exclusion of psychiatric and psychological evidence of his

inability to formulate the specific intent for first degree murder violates his rights to due process (ground one) and to remain silent (ground two). He seeks an evidentiary hearing claiming that under Townsend v. Sain, 372 U.S. 293 (1963), a hearing is mandatory because the state factual determination is not fairly supported by the record and the fact finding procedure was not adequate to afford a full and fair hearing.

In habeas corpus actions, federal courts address only deprivations of constitutionally protected interests. Wainwright v. Goode, 464 U.S. 78, 86 (1983)(per curiam); Engle v. Isaac, 456 U.S. 107, 119 (1982). Federal courts have no supervisory authority over state action which is of constitutional magnitude. Soap v. Carter, 632 F.2d 872, 876 (10th Cir. 1980), cert. denied, 451 U.S. 939 (1981). Habeas corpus relief is not generally available to review trial court errors. Martley v. Dougles, 463 F. Supp 4, 8 (W.D. Okla.

1977). The established rule in this circuit regarding challenges to admission of evidence at trial is as follows: "State court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980).

A review of the record shows that petitioner did in fact receive a full and fair hearing on the matter, therefore, his request for an evidentiary hearing should be denied. Contrary to petitioner's claim that the trial court acted sua sponte, the trial court had before it a Motion in Limine To Strike Psychiatrist Evidence that had been filed by the prosecution. The prosecution sought to exclude certain evidence because defendant had not complied with the statutory procedures pertaining to the affirmative defense of

impaired mental condition. Extensive legal arguments were heard on the matter at two hearings and the motion to strike quoted relevant language in a psychiatric report later admitted into the record. There were no facts in dispute.

At the first hearing, the court ordered the petitioner to submit to a standard psychiatric examination, in the presence of petitioner's counsel, by the prosecution's psychiatrist, Dr. Seymour Sundell. The court advised petitioner's counsel that the evidence would be excluded for failure to comply. (Transcript of March 19, 1986, hearing at 21-22). It was admitted at the second hearing that petitioner responded to all questions during an exam by invoking his Fifth Amendment Right to remain silent. The trial court then ruled on the motion to strike finding the petitioner's psychiatric evidence inadmissible on the issue of his ability to form specific intent to commit murder. (Transcript of April 9, 1986, hearing at 7, 11)

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At the hearings and in his pleadings to this and other courts, petitioner's counsel has argued that Dr. Dean Plazak would testify and his report would show that defendant did not form the requisite specific intent for the crime of first degree murder. Counsel maintains that this evidence is distinguishable from the affirmative defense of impaired mental condition because petitioner "didn't" form the intent (as opposed to "can't") and because petitioner is merely negating an element of the charge. - Dr. Plazak's report provides that petitioner suffers from two mental diseases and that "[t]his examiner is further of the opinion that these disorders or mental impairments precluded the capacity of Mr. Chenevert to form the specific intent required for the cc mission of those crimes presently charged." (Report at 8-9). (Emphasis in original).

The language is consistent with the definition of impaired mental condition as used in the statute providing

for that defense. Colo. Rev. Stat. Section 16-8-103.5 (1986). "Impaired mental condition means a condition of mind, caused by mental disease or defect, which does not constitute insanity but, nevertheless, prevents the person from forming a culpable mental state which is an essential element of a crime charged." Colo. Rev. Stat. Section 16-8-102 (2.7) (1986) (emphasis added). The statute does not distinguish between "can't" and "didn't" with regard to the formation of the culpable mental state so that petitioner's argument fails in that regard. In addition, petitioner's argument that he is merely negating an element of the charge has been rejected by the Colorado Supreme Court. "The defense of impaired mental condition applies where the defendant intends to contest the commission of the crime due to his alleged inability to formulate the requisite culpable mental state." People v. Low, 732 P.2d 622, 632 (Colo. 1987).

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As noted by the Court of Appeals, reasonable pre-conditions to the exercise of the fundamental right to present witnesses is not an abridgment of that right. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); People v. Hampton, 696 P.2d 765, 774 (Colo. 1985). "The General Assembly can require certain matters to be raised by a special plea without offending the constitutional rights of the accused." People v. Low, 732 P.2d at 627. c.f. Hendershott v. People, 653 P.2d 385, 390 (Colo. 1982), cert. denied, 459 U.S. 1225 (1983).

The affirmative defense of impaired mental condition must be raised by a special plea. Colo. Rev. Stat. Section 16-8-103.5 (1) (1986). The purpose of this statute is to prevent a defendant from asserting the defense in such a manner as to circumvent the requirements of disclosure under Colo. R. Crim. P. 16. Section 16-8-103.5 (6). Oral argument at the two hearings, the motion to strike which

quoted Dr. Plazak's report and the report itself all establish that plaintiff's arguments are, in fact, a ploy to circumvent the statutory requirements. Moreover, Dr. Sundell's report which was based on much of the saine information as Dr. Plazak's report (except for the limited interview with the petitioner) indicates that none of the material is indicative of impaired mental condition. Dr. Sundell further states that Dr. Plazak's report is very general and offers "no specifics to clarification as to the basis for his finding..." (Report at 13).

The fact that petitioner elected to remain silent during the examination by the prosecution was not the basis for the trial court's ruling. Rather, the trial court correctly ruled as a matter of law that the evidence was inadmissible based on petitioner's refusal to assert the defense of impaired mental condition.

IT IS THEREFORE ORDERED that petitioner's request for an evidentiary hearing be denied, petitioner having

received a full and fair hearing on the matter.

IT IS FURTHER RECOMMENDED that the petition for writ of habeas corpus be denied.

DATED at Denver, Colorado, this 9th day May, 1991.

BY THE COURT:

/s/
HILBERT SCHAUER
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

90-C-268

Clifford J. Barnard
Attorney at Law
5360 Manhattan Circle, #101
Boulder, CO 80303

Hope P. McGowan
Assistant Attorney General
Appellate Section
110 16th St., #1000
Denver, CO 80202

I certify that I mailed a copy of the attached to the persons listed above on May 10, 1991.

/s/_____
Deputy Clerk

Stamped: FILED
United States District Court
Denver, Colorado
May 9, 1991
James R. Manspeaker, Clerk
/s/ M.R.B.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

CASE NO. 90-C-268

JAMES J. CHENEVERT,

Plaintiff,

v.

LOU A. HESS, et al.,

Defendants.

ORDER

CARRIGAN, J.

Petitioner, James G. J. Chenevert, who is currently incarcerated at the Fremont Correctional Facility, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The case was assigned to Magistrate Judge Schauer who reviewed the matter and prepared a recommendation pursuant to Local Rule 605. Copies of both the recommendation and Local Rule 605 were mailed

to the petitioner on May 9, 1991. Petitioner has filed an objection to the Magistrate Judge's recommendation.

Petitioner's objections, prepared by counsel, simply rehashes the arguments made before the Magistrate Judge. In his objection the petitioner states: (1) that the trial court excluded sua sponte rather than upon the State of Colorado's motion; (2) that he did not receive a full and fair evidentiary hearing; and (3) that the Magistrate Judge did not understand his legal argument. I address each argument in turn.

During the petitioner's murder trial, the State of Colorado sought to exclude certain psychiatric testimony. Petitioner asserts that the hearings held to determine whether the contested evidence was admissible were insufficient. In addition, the petitioner asserts that because the State had requested that the trial judge not rule on its motions in limine, exclusion of the evidence was improper.

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A trial judge need not await action by one of the parties to exclude inadmissible evidence. The affirmative defense of impaired mental condition must be raised by special plea. Colo. Rev. Stat. 16-8-103.5. After several hearings, the trial judge properly concluded that because the petitioner had failed to comply with the statute's notice requirement, the proffered evidence was inadmissible. Thus, even if the court acted on its own initiative, no constitutional violation occurred.

In his objection, the petitioner states that he did not receive a full and fair hearing before the proffered evidence was excluded. This assertion is unsupported and contradicts the record. For instance, in his opening brief to the Colorado Court of Appeals, the petitioner makes reference to hearings held on March 7 and 19, 1986, and April 9, 1986. It appears therefore that this issue was extensively argued before the trial court ruled.

APPENDIX D

Finally, the petitioner argues that the Magistrate Judge did not understand his position and therefore an evidentiary hearing is necessary. Petitioner extensively briefed the issues here presented and the Magistrate Judge reviewed the entire file before issuing his recommendation. If the Magistrate Judge did not understand the petitioner's argument, or if he believed that additional briefing or oral argument would have assisted his decision, he would have ordered either or both.

I have examined the entire file, the Magistrate Judge's recommendation and the petitioner's objection. The recommendation appears to be supported by the law and the facts, therefore I adopt it as the order of this court.

Accordingly IT IS ORDERED that:

(1) the Magistrate Judge's recommendation is adopted as the order of this court;

(2) the petitioner's objection is overruled; and

APPENDIX D

(3) the petition for writ of habeas corpus is denied.

Dated at Denver, Colorado May 31, 1991.

BY THE COURT:

/s/
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

Magistrate Judge Shauer

Clifford Barnard, Esq.
5360 Manhattan Circle #101
Boulder, CO 80303

Hope McGowan, Esq.
110 16th St. #1000
Denver, CO 80202

/s/_____
Deputy Clerk

Dated: May 31,1991

Re: 90-C-268

Stamped: FILED
United States District Court
Denver, Colorado
May 3, 1991

James R. Manspeaker, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES G.J. CHENEVERT,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 91-1251
v.	)	(D.C. No.90-C-268)
	)	(D. Colo.)
LOU A. HESSE, Superintendent Fremont Correctional Facility,	)	
	)	
	)	
Respondent-Appellee.	)	

ORDER AND JUDGEMENT[1]

Before SEYMOUR and ANDERSON, Circuit Judges, and SAM,**, District Judge.

**Honorable David Sam, District Judge, United States District Court for the District of Utah, sitting by designation.

---

[1] This order and judgement has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

APPENDIX E

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

On May 9, 1986, Petitioner-appellant James Chenevert was convicted of the first degree murder of his wife. The conviction followed a jury trial in Colorado state court. After exhausting his state remedies, Petitioner filed this habeas corpus action pursuant to 28 U.S.C. Section 2254. He alleges the trial court's exclusion of certain psychiatric evidence violated his due process and Fifth Amendment rights. The district court adopted the magistrate's recommendation to deny the petition. We affirm.

"It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a

constitutional dimension." Wainwright v. Goode, 464 U.S. 78, 83 (1983). In particular, state court rulings on the admission of evidence will not be overturned "unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional dimension." Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). Here, Petitioner maintains that the district court's order excluding the testimony of Dr. Dean Plazak violated his constitutional rights.

Petitioner offered the testimony of Dr. Plazak to show that "mental impairments precluded . . . [his] capacity . . . to form the specific intent required for the commission of those crimes . . . charged." Appellant's App. at 81-82. In Colorado, impaired mental condition is an affirmative defense which must be specially pled. Colo. Rev. Stat. Section 16-8-103.5. Unless good cause is shown, failure to assert the defense at arraignment constitutes waiver. See id.

APPENDIX E

Here, Petitioner never even attempted to raise his alleged mental impairment as an affirmative defense. Consequently, the trial court excluded Dr. Plazak's testimony. Petitioner maintains, however, that the type of mental impairment he has does not fall within the statute, and, therefore, exclusion of the evidence was error.

The statute provides,

> Section 18-1-803 Impaired mental condition
>
> (1) Evidence of an impaired mental condition, as defined in section 16-8-102(2.7), C.R.S., though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form the culpable mental state which is an element of the offense charged.

Colo. Rev. Stat. Section 18-1-803. Mental impairment is defined as,

> [A] condition of mind, caused by mental disease or defect, which does not constitute insanity but, nevertheless, prevents the person from forming a culpable mental state which is an essential element of a crime charged. For the purposes of this subsection (2.7), 'mental disease or defect' includes only those severely abnormal mental conditions

> which grossly and demonstrably impair a person's perception or understanding of reality and which are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Colo. Rev. Stat. Section 16-8-102(2.7). Petitioner contends his impairment, "paranoid disorder," is not so severe as to come within the definition described above. This fact, he asserts, makes the provision inapplicable.

All defendants retain the fundamental right to present witnesses on their behalf. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In exercising this right, however, a defendant "must comply with established rules of [state] procedure." Id. In Colorado, the general assembly has made an affirmative decision to allow mental impairment evidence only when the defendant complies with certain procedural prerequisites. See People v. Low, 732 P.2d 622, 632 (Colo. 1987); see also People v. Collins, 752 P.2d 93,97 (Colo. 1988)("The legislature chose to allow an

affirmative defense of impaired mental condition. . . ."). In this case, Petitioner waived the ability to present this evidence when he failed to comply with those prerequisites.

The substantial body of Colorado law interpreting the mental impairment statute supports our conclusion. The statute evolved out of a general recognition that evidence of mental disease short of insanity is relevant in determining whether a defendant has the ability to formulate the requisite intent to commit a crime. Low, 732 P.2d at 630. "The sole effect of the defense . . . is to negate the existence of an element of the crime charged." Id. at 631. Petitioner admits Dr. Plazak's testimony was intended specifically to negate the intent element of the murder charge. See Petitioner's Opening Br. at 7-8. Thus, he attempts to do exactly what the statute intended, albeit without complying with procedural prerequisites.

The statute specifically states the legislature's intent

that the defense not be used to "circumvent the requirements of disclosure specified in rule 16 of the Colorado rules of criminal procedure." Colo. Rev. Stat. Section 16-8-103.5(6). It would be totally inconsistent with this intent to allow the "non-use" of the statute to undermine these same disclosure requirements. The state court's actions were not in error. Colorado law simply does not support an argument which would allow the introduction of mental impairment evidence, of any kind, outside the parameters of this statute.

Finally, Petitioner maintains his Fifth Amendment rights were abridged because the trial court excluded the psychiatric testimony shortly after Petitioner refused to answer the questions posed by the prosecution's psychiatrist. Pursuant to the mental impairment statute, once the defense is raised, the accused must submit to a psychological examination. See Colo. Rev. Stat. Section 16-8-103.5(4).

Such a requirement does not violate defendant's Fifth Amendment right to remain silent where Defendant has raised the issue of his mental impairment. See United States v. Madrid, 673 F.2d 1114, 1121 (10th Cir.)(citing Karstetter v. Cardwell, 526 F.2d 1144 (9th Cir. 1975)(admission of testimony that Defendant refused to talk to court-appointed psychiatrists did not impermissibly infringe self-incrimination privilege)), cert. denied, 459 U.S. 843 (1982). There is nothing in the record to indicate the trial court based its decision to exclude the evidence on Petitioner's assertion of the Fifth Amendment. Consequently, we reject this argument.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Stephen H. Anderson
Circuit Judge

APPENDIX E

Stamped: FILED, United States Court of Appeals,
Tenth Circuit
April 10, 1992
Robert L. Hoeckee
Clerk

APPENDIX F

COLORADO REVISED STATUTES

. . .

16-8-102. **Other definitions.** As used in this article, unless the context otherwise requires:

. . .

(2.7) "Impaired mental condition" means a condition of the mind, caused by mental disease or defect, which does not constitute insanity but, nevertheless, prevents the person from forming a culpable mental state which is an essential element of a crime charged. For the purposes of this subsection(2.7), "mental disease or defect" includes only those severely abnormal mental conditions which grossly and demonstrably impair a person's perception or understanding of reality and which are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality

manifested only by repeated criminal or otherwise antisocial conduct.

. . .

16-8-103.5. **Impaired mental condition** - when raised - procedure - legislative intent.

(1) If the defendant intends to assert the affirmative defense of impaired mental condition, he shall indicate that intention to the court and to the prosecution at the time of arraignment; except that the court, for good cause shown, shall permit the defendant to inform the court and the prosecution of his intention to assert the affirmative defense of impaired mental condition at any time prior to trial.

(2) If counsel for the defendant believes that an assertion of the affirmative defense of impaired mental condition should be entered on behalf of the defendant but the defendant refuses to permit counsel to offer such evidence, counsel may so inform the court. The court shall

then conduct such investigation as it seems proper, which may include the appointment of psychiatrists or psychologists to assist a psychiatrist to examine the defendant and advise the court. After its investigation, the court shall conduct a hearing to determine whether the evidence of impaired mental condition should be offered at the trial. If the court finds that such a defense is necessary for a just determination of the charge against the defendant, it shall inform the prosecution that such defense shall order the defendant's counsel to present evidence of impaired mental condition.

(3) At the time at which the defendant announces his intention to assert the affirmative defense of impaired mental condition, the court shall advise the defendant of the effect and the consequences of the asserting the defense.

(4) When the defendant indicates his intention to assert the defense of impaired mental condition, the court

shall order an examination of the defendant pursuant to section 16-8-106. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of persons, other than medical experts subject to the provisions of section 16-8-103.6, whom the parties intend to call as witnesses with regard to the affirmative defense of impaired mental condition.

(5) If the trier of facts finds the defendant not guilty by reason of impaired mental condition, pursuant to section 18-1-803 (3), C.R.S., the court shall commit the defendant to the custody of the department of institutions until such time as he is found eligible for release, pursuant to the standards set forth in sections 16-8-115 and 16-8-120. The executive director of the department of institutions shall designate the state facility at which the defendant shall be held for care and psychiatric treatment and may transfer the defendant from one institution to another if in the opinion

of the director it is desirable to do so in the interest of the proper care, custody, and treatment of the defendant or the protection of the public or the personnel of the facilities in question.

(6) It is the intent of the general assembly that the assertion of the affirmative defense of impaired mental condition not be made in such a fashion that it is used to circumvent the requirements of disclosure specified in rule 16 of the Colorado rules of criminal procedure.

(7) A defendant may raise impaired mental condition only through an assertion of affirmative defense.

16-8-103.6. **Waiver of privilege.** A defendant who places his mental condition at issue by pleading not guilty by reason of insanity pursuant to section 16-8-103, asserting the affirmative defense of impaired mental condition pursuant to section 16-8-103.5, or raising the question of incompetency to proceed pursuant to section 16-8-110

waives any claim of confidentiality or privilege as to communications made by him to a physician or psychologist in the course of an examination or treatment for such a mental condition for the purpose of any trial or hearing on the issue of such mental condition. The court shall order both the prosecutor and the defendant to exchange names, addresses, reports, and statements of any physicians or psychologist who has examined or treated the defendant for such mental condition.

16-8-103.7. **Examination after entry of defenses of insanity and impaired mental condition.** When, at the time of arraignment, the defense of insanity is raised, pursuant to section 16-8-103, and the defendant asserts his intention to raise the affirmative defense of impaired mental condition, pursuant to section 16-8-103.5, the court shall order one examination of the defendant with regard to both defenses pursuant to section 16-8-106.

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. . .

16-8-106. **Examinations and report.** (1) All examinations ordered by the court in criminal cases shall be accomplished by the entry of an order of the court specifying the place where such an examination is to be conducted and the period of time allocated for such an examination. The defendant may be committed for such examination to the Colorado psychiatric hospital in Denver, the Colorado mental health institute at Pueblo, the place where he is in custody, or such other public institution designated by the court. In determining the place where such examination is to be conducted, the court shall give priority to the place where the defendant is in custody, unless the nature and the circumstances of the examination require designation of a different facility. The defendant shall be observed and examined by one or more physicians who are specialists in nervous and mental diseases during such period as the court

directs. For good cause shown, upon motion of the prosecution or defendant, or upon the court's own motion, the court may order such further or other examination, including services of psychologists, as is advisable under the circumstances. Nothing in this section shall abridge the right of the defendant to procure a psychiatric examination as provided in section 16-8-108.

(2) The defendant shall have a privilege against self-incrimination during the course of an examination under this section. The fact of the defendant's noncooperation with psychiatrists and other personnel conducting the examination may be admissible in the defendant's trial on issues of insanity, competency, or impaired mental condition.

(3) To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the

circumstances surrounding the commission of the offence, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is non-cooperative with psychiatrists and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity, eligibility for release, impaired mental condition, or competency to proceed, the physicians

and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of commission of the alleged offense and at the present time.

(4) A written report of the examination shall be prepared in triplicate and delivered to the clerk of the court which ordered it. The clerk shall furnish a copy of the report both to the prosecuting attorney and the counsel for the defendant.

(5) The report of the examination shall include, but is not limited to:

(a) The name of each physician or other expert who examined the defendant; and

(b) A description of the nature, content, extent, and results of the examination and any tests conducted; and

APPENDIX F

(c) A diagnosis and prognosis of the defendant's physical and mental condition; and

(d) An opinion as to whether the defendant suffers from a mental disease or defect; and if so,

(e) Separate opinions as to whether the defendant was insane or had an impaired mental condition at the time of the commission of the act, is incompetent to proceed, or is ineligible for release, as those terms are defined in this article. The nature of the opinions required depends upon the type of examination ordered by the court.

16-8-107. **Evidence.** (1) Except as provided in this subsection (1), no evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination under section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible against the defendant on the issues raised by a plea of not guilty, if the

defendant is put to trial on those issues, except to rebut evidence of his mental condition introduced by the defendant to show incapacity to form a culpable mental state, and the jury, at the request of either party, shall be so instructed. If the defendant testifies in his own behalf upon the trial of the issues raised by the plea of not guilty, the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony.

(2) In any trial or hearing concerning the defendant's mental condition, physicians and other experts may testify as to their own conclusions reached from their examination of hospital records, laboratory reports, X-rays, electroencephalograms, and psychological test results if the material which they examined in reaching their conclusions is produced at the time of the trial or hearing.

16-8-108. **Examination at instance of defendant.** (1) If the defendant wishes to be examined by a psychiatrist,

psychologist, or other expert of his own choice in connection with any proceeding under this article, the court, upon timely motion, shall order that the examiner chosen by the defendant be given reasonable opportunity to conduct the examination.

(2) A copy of any report of examination of the defendant made at the instance of the defense shall be furnished to the prosecution a reasonable time in advance of trial.

16-8-109. **Testimony of lay witnesses.** In any trial or hearing in which the mental condition of the defendant is an issue, witnesses not specially trained in psychiatry or psychology may testify as to their observation of the defendant's actions and conduct, and to conversations which they have had with him bearing upon his mental condition, and they shall be permitted to give their opinions or conclusions concerning the mental condition of the defendant.

APPENDIX G

1983 AMENDMENT
RULE 12.2(b)

Courts have recently experienced difficulty with the question of what kind of expert testimony offered for what purpose falls within the notice requirement of rule 12.2(b). See, e.g., United States v. Hill, 655 F.2d 512 (3rd Cir. 1980) (rule not applicable to tendered testimony of psychologist concerning defendant's susceptibility of inducement, offered to reinforce defendant's entrapment defense); United States v. Webb, 625 F.2d 709 (5th Cir.1980) (rule not applicable to expert testimony tendered to show that defendant lacked the 'propensity to commit a violent act,' as this testimony was offered 'to prove that Webb did commit the offence charged,' shooting at a helicopter, 'not that certain conduct was unaccompanied by criminal intent'); United States v. Perl, 584 F.2nd 1316 (4th Cir. 1978) (because entrapment defense properly withheld

from jury, it was unnecessary to decide if the district court erred in holding rule applicable to tendered testimony of the doctor that defendant had increased susceptibility to suggestion as a result of medication he was taking); United States v. Olson, 576 F.2d 1267 (8th Cir. 1978)(rule applicable to tendered testimony of alcoholism and drug therapist that defendant was not responsible for his actions because of a problem with alcohol); United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977)(rule applicable to tendered testimony of psychologist that defendant, charged with assaulting federal officer, was more likely to hurt himself than to direct his aggressions toward others, as this testimony bears upon whether defendant intended to put victim in apprehension when he picked up the gun).

What these cases illustrate is that expert testimony about defendant's mental condition may be tendered in a wide variety of circumstances well beyond the situation

clearly within rule 12.2(b), i.e., where a psychiatrist testifies for the defendant regarding his diminished capacity. In all of these situations and others like them, there is good reason to make applicable the notice provisions of rule 12.2(b). This is because in all circumstances in which the defendant plans to offer expert testimony concerning his mental condition at the time of the crime charged, advance disclosure to the government will serve 'to permit adequate pretrial preparation, to prevent surprise at trial, and to avoid the necessity of delays during trial.' 2 A.B.A. Standards for Criminal Justice 11-55 (2nd 1980). Thus, while the district court in United States v. Hill, 481 F.Supp. 558 (E.D.Pa. 1979), incorrectly concluded present rule 12.2(b) covers testimony by a psychologist bearing on the defense of entrapment, the court quite properly concluded that the government would be seriously disadvantaged by lack of notice. This would have meant that the government would

not have been equipped to cross-examine the expert, that any expert called by the government would not have had an opportunity to hear the defense expert testify, and that the government would not have had an opportunity to conduct the kind of investigation needed to acquire rebuttal testimony on defendant's claim that he was especially susceptible to inducement. Consequently, rule 12.2(b) has been expanded to cover all of the aforementioned situations.

APPENDIX H

DSM-III:Clinical Definition of Paranoid Personality Disorder

301.00 Paranoid Personality Disorder

The essential feature is a Personality Disorder (p. 305) in which there is a pervasive and unwarranted suspiciousness and mistrust of people, hypersensitivity, and restricted affectivity not due to another mental disorder, such as Schizophrenia, or a Paranoid Disorder.

An attitude of suspicion is not only justified but is adaptive in many difficult life situations. A person without signs of mental disorder is willing in such a situation to abandon suspicions when presented with convincing contradictory evidence, but one with Paranoid Personality Disorder ignores such evidence, and may even become suspicious of someone who challenges his or her suspicious ideas. Individuals with this disorder are typically hypervigilant and take precautions against any perceived threat. They tend to avoid blame even when it is

warranted. They are often viewed by others as guarded, secretive, devious, and scheming. They may question the loyalty of others, always expecting trickery. For this reason, there may even be some pathological jealousy.

When individuals with this disorder find themselves in a new situation, they intensely and narrowly search for confirmation of their expectations, with no appreciation of the total context. Their final conclusion is usually precisely what they expected in the first place. They are concerned with hidden motives and special meanings. Often, transient ideas of reference occur, e.g., that others are taking special notice of them, or saying vulgar things about them.

Individuals with this disorder are usually argumentive and exaggerate difficulties by "making mountains out of molehills." They often find it difficult to relax, usually appear tense, and show a tendency to counterattack when they perceive any threat. Though they are critical of others,

and often litigious, they have great difficulty accepting criticism themselves.

These individuals' affectivity is restricted, and they may appear "cold" to others. They have no true sense of humor and are usually serious. They may pride themselves on always being objective, rational, and unemotional. They usually lack passive,soft, sentimental, and other tender feelings.

Associated features. Individuals with this disorder are occasionally seen by others as keen observers who are energetic, ambitious, and capable; but more often they are viewed as hostile, stubborn, and defensive. They tend to be rigid and unwilling to compromise. They often generate uneasiness and fear in others. Often there is an inordinate fear of losing independence or the power to shape events in accordance with their own wishes.

They usually avoid intimacy except with those in

whom they have absolute trust. They show an excessive need to be self-sufficient, to the point of ego-centricity and exaggerated self-importance. They avoid participation in group activities unless they are in a dominant position.

They are often interested in mechanical devices, electronics, and automation. They are keenly aware of power and rank and of who is superior or inferior, and are often envious and jealous of those in positions in power. They disdain people seen as weak, soft, sickly, or defective. They are generally uninterested in art or aesthetics.

During periods of extreme stress, transient psychotic symptoms may occur, but of insufficient severity or duration to warrant an additional diagnosis.

Impairment. Because individuals with this disorder usually realize that it is prudent to keep their unusual ideas to themselves, impairment is generally minimal. However, occupational difficulties are common, especially in relating

to authority figures or co-workers. In more severe cases, all relationships are grossly impaired.

Complications. The relationship of this disorder to the Paranoid Disorders (p.196) and Schizophrenia, Paranoid Type (p.188), is unclear. However, certain of the essential features of Paranoid Personality Disorder, such as suspiciousness and hypersensitivity, may predispose to the development of these other disorders.

Predisposing factors. No information.

Prevalence. This disorder rarely comes to clinical attention, since such persons rarely seek help for their personality problems or require hospitalization. Owing to a tendency of some of them to be moralistic, grandiose, and extrapunitive, it seems likely that individuals with this disorder are overrepresented among leaders of mystical or esoteric religions and of pseudoscientific and quasi-political groups.

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Sex ratio. This disorder is more commonly diagnosed in men.

Familial pattern. No information.

Differential diagnoses. In Paranoid Disorders and Schizophrenia, Paranoid Type, there are persistent psychotic symptoms, such as delusions and hallucinations, that are never a part of Paranoid Personality Disorder. However, these disorders may be superimposed on Paranoid Personality Disorder. Antisocial Personality Disorder shares several features with Paranoid Personality Disorder,e.g., difficulty in forming and sustaining close relationships, and poor occupational performance; but except when the two disorders coexist, a lifelong history of antisocial behavior is not present in Paranoid Personality Disorder.

Diagnostic criteria for Paranoid Personality Disorder.

The following are characteristic of the individual's current and long-term functioning, are not limited to

APPENDIX H

episodes of illness, and cause either significant impairment in social or occupational functioning or subjective distress.

A. Pervasive, unwarranted suspiciousness and mistrust of people as indicated by at least three of the following:

(1) expectation of trickery or harm

(2) hypervigilance, manifested by continual scanning of the environment for signs of threat, or taking unneeded precautions

(3) guardedness or secretiveness

(4) avoidance of accepting blame when warranted

(5) questioning the loyalty of others

(6) intense, narrowly focused searching for confirmation of bias, with loss of appreciation of total context

(7) overconcern with hidden motives and special meanings

(8) pathological jealousy

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B. Hypersensitivity as indicated by at least two of the following:

(1) tendency to be easily slighted and quick to take offense

(2) exaggeration of difficulties,e.g., "making mountains out of molehills"

(3) readiness to counterattack when any threat is perceived

(4) Inability to relax

C. Restricted affectivity as indicated by at least two of the following:

(1) appearance of being "cold" and unemotional

(2) pride taken in always being objective, rational, and unemotional

(3) lack of true sense of humor

(4) absence of passive, soft, tender, and sentimental feelings

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D. Not due to another mental disorder such as Schizophrenia or a Paranoid Disorder.

APPENDIX I

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DIPLOMATE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY
DIPLOMATE AMERICAN BOARD OF FORENSIC PSYCHIATRY

January 31, 1986

H. Patrick Furman
Deputy State Public Defender
2426 East Bridge
Brighton, Colorado 80601

Re: James G.J. Chenevert
B.D. 3-23-30
C.A. No. 85CR1106, Adams County

Dear Mr. Furman:

James Chenevert, age fifty-five, widower, was examined within the structure of a complete neuropsychiatric examination, at your request, for the purposes of

determining the presence or absence of indications of mental impairment with the respect to the charges of first degree murder alleged to have occurred on or about November 6, 1985. Direct examinations of Mr. Chenevert were conducted at the Adams County Detention Center, total time in excess of eleven hours, on November 9, 13, and 22, 1985. In addition, police reports concerning the alleged incident, statements of witnesses and related individuals, newspaper accounts of preceding events, foster parent documents concerning Karen Wood, and various documents concerning a marriage dissolution proceeding involving Mr. Chenevert and his wife, Mary Joann, as well as several miscellaneous documents were all carefully reviewed, as was a report of psychological evaluation dated January 6, 1986, prepared for this examiner after, at his request, Mark G. Pendleton, Ph.D performed projective psychological testing on Mr. Chenevert on December 27, 1985 and January 6,

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1986.

As a result of this extensive evaluation, this examiner is of the opinion that Mr. Chenevert has suffered lifelong from a condition best described as a paranoid personality disorder; and that at the time of the alleged events leading to the charges presently alleged against him, and commencing in 1974 and possibly sooner, he was suffering from two mental diseases classified as psychotic disorders, specifically those of paranoid disorder (chronic "conjugal paranoia" or delusional jealousy) and major depression, recurrent with mood-congruent psychotic features. All of these disorders were also present at the time of the examinations, although in lesser intensity. This examiner is further of the opinion that these disorders or mental impairments precluded the capacity of Mr. Chenevert to form the specific intent required for the commission of those crimes presently charged. After careful evaluation of the circumstances

involved in the significant events in Mr. Chenevert's life, particularly subsequent to 1974, this examiner is also of the opinion that a recurrence of those events leading to the charge presently alleged would be highly unlikely to recur unless the factual circumstances which have occurred in his life were to be reasonably approximately duplicated within the same time frame, i.e., from the time of his marriage in 1948 until the time of the incident in 1985, circumstances which took some thirty-seven years to develop mental mechanism factors evolving and apparent from the psychological evaluation were in the opinion of this examiner corroborative.

Sincerely,

/s/
Dean J. Plazak, M.D.